

## **WCA Rule Advisory Committee 1-31-08 Meeting Draft Scope, LGU Duties, and Miscellaneous Sections**

### **8420.0100 PURPOSE.**

This chapter implements the regulatory provisions of the Wetland Conservation Act of 1991, Laws 1991, chapter 354, as amended by Laws 1993, chapter 175; Laws 1994, chapter 627; Laws 1996, chapter 462; Laws 2000, chapter 382; ~~and~~ Laws 2001, chapter 146; Laws 2002, chapter 220; Laws 2003, chapter 128; Laws 2004, chapters 221 and 255; and Laws 2007, chapters 57 and 131. This chapter shall be interpreted to implement the purpose of the act, which is to:

A. achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands;

B. increase the quantity, quality, and biological diversity of Minnesota's wetlands by restoring or enhancing diminished or drained wetlands;

C. avoid direct or indirect impacts from activities that destroy or diminish the quantity, quality, and biological diversity of wetlands; and

D. replace wetland values where avoidance of activity is not feasible and prudent.

STAT AUTH: MS s [14.06](#); [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135

### **8420.0102 INTRODUCTION.**

The regulatory provisions of the Wetland Conservation Act ~~achieves advance~~ the purpose in part [8420.0100](#) by requiring persons proposing to impact a wetland ~~by draining, excavating, or filling~~ to first, attempt to avoid the impact; second, attempt to minimize the impact; and finally, replace any impacted area with another wetland of at least equal function and value. As specified in greater detail in part [8420.0122](#), certain projects are exempt from the requirement for a replacement plan under the Wetland Conservation Act.

**The changes above are intended to clarify the role of WCA rule in overall state wetland management policy, which also includes non-regulatory restoration programs. Eliminating “by draining, excavating, or filling,” a change that is repeated throughout the rule, is proposed to simplify language and reference all regulated wetland activities consistently as “impact”. “Impact” is defined in 8420.0110, subpart 23.**

The Wetland Conservation Act is administered by local government units with oversight provided by the Board of Water and Soil Resources. Enforcement of the act is provided by Department of Natural Resources conservation officers and other peace officers. The Wetland Conservation Act became effective on January 1, 1992, and this chapter and portions of Minnesota Statutes, chapters 103A, 103B, 103E, 103F, and 103G, govern its implementation. The public is encouraged to contact their local government unit or soil and water conservation district for general information on wetlands and the interpretation of this chapter. This part is for general introductory information only. The other parts of this chapter shall control over this part.

STAT AUTH: MS s [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 22 SR 1877; 25 SR 152; 27 SR 135

#### 8420.0103 WETLAND FUNCTIONS FOR DETERMINING PUBLIC VALUES.

The public values of wetlands must be based upon the functions of wetlands, including:

A. water quality, including filtering of pollutants to surface and groundwater, utilization of nutrients that would otherwise pollute public waters, trapping of sediments, shoreline protection, and utilization of the wetland as a recharge area for groundwater;

B. flood water and storm water retention, including the potential for flooding in the watershed, the value of property subject to flooding, and the reduction in potential flooding by the wetland;

C. public recreation and education, including hunting and fishing areas, wildlife viewing areas, and nature areas;

D. commercial uses, including wild rice and cranberry growing and harvesting and aquaculture;

E. fish, wildlife, and native plant habitats;

F. low-flow augmentation; and

G. other functions, values, and public uses as identified in board-approved wetland evaluation methods.

The board shall maintain a publicly available list of preapproved wetland evaluation methods.

STAT AUTH: MS s [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 22 SR 1877; 25 SR 152; 27 SR 135

#### 8420.0105 SCOPE.

Wetlands must not be ~~drained, excavated, or filled~~ impacted wholly or partially unless replaced by restoring or creating wetland areas of at least equal public value. This chapter regulates draining, filling, and excavation in the permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands, and in all wetland types if the excavation results in filling, draining, or a loss of quantity, quality, or biological diversity, if excavation includes filling or draining or results in conversion to nonwetland.

**The language above is proposed to allow LGU's to regulate excavation activities that cause a loss in quality and/or biological diversity of wetlands due to poor construction, excavation of highly functional wetlands, etc. Conditions will be added to the section corresponding to No-Loss. The specific conditions will be discussed later. The above language also simplifies the rule by eliminating the reference to type 3, 4, and 5 wetlands and treating all wetland types the same in regards to excavation.**

This chapter does not prevent the use of the bed of wetlands for pasture or cropland during dry periods if dikes, ditches, tile lines, or buildings are not constructed or improved, and the agricultural use does not ~~result in the drainage of~~ impact the wetlands. This chapter does not prevent filling a wetland to accommodate wheeled booms on irrigation devices if the fill does not impede normal drainage. This chapter does not prevent control of noxious weeds if the control does not ~~drain or fill~~ impact the wetland.

This chapter does not apply to the public waters and public waters wetlands as defined in Minnesota Statutes, section [103G.005](#), subdivisions 15 and 15a, which have been inventoried by the commissioner of natural resources according to Minnesota Statutes, section [103G.201](#), except that:

A. for projects affecting public waters wetlands, and for public transportation projects affecting the wetland areas of public waters, when the commissioner waives the requirement for a public waters work permit consistent with chapter 61 15, the local government unit shall make replacement, banking, wetland boundary, wetland type, no-loss, public road project notification, or exemption determinations; or

B. for projects affecting both public waters and wetlands, the local government unit may, by written agreement with the commissioner, waive the requirement for a replacement plan, no-loss, or exemption determination if a public waters work permit is required and the commissioner includes the provisions of this chapter in the public waters work permit.

This chapter is in addition to other regulations including those of the United States Army Corps of Engineers, United States Department of Agriculture, Minnesota state agencies, watershed districts, and local governments.

This chapter does not apply to peat mining as defined in Minnesota Statutes, section [93.461](#), which is subject to the permit to mine and reclamation requirements of Minnesota Statutes, sections [93.44](#) to [93.51](#), and the rules of the commissioner adopted under those sections.

This chapter does not require state agencies to obtain local government unit approvals. However, state agencies shall coordinate with local government units when conducting activities in wetlands within the jurisdiction of the local government unit. The state agencies shall follow the same sequencing and replacement requirements as prescribed by this chapter.

In addition to the provisions of this chapter, governmental decisions on ~~draining, excavating, and filling of impacting~~ wetlands are subject to Minnesota Statutes, chapters 116B and 116D, which provide that an action which is likely to have material adverse effects on natural resources must not be allowed if there is a feasible and prudent alternative consistent with the requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its natural resources. Economic considerations alone do not justify adversely effective actions.

STAT AUTH: MS s [14.06](#); [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 18 SR 274; L 1996 c 462 s 43; 22 SR 1877; 25 SR 152; 27 SR 135

## **8420.0200 DETERMINING LOCAL GOVERNMENT UNIT; DUTIES.**

Subpart 1. **Determinations of local government unit.** The local government unit responsible for making exemption, wetland type, wetland boundary, and no-loss determinations and approving replacement and wetland banking plans shall be determined according to items A to ~~ED~~.

A. Outside the seven-county metropolitan area, the local government unit is the county ~~or, city, city, or soil and water conservation district~~ in which the ~~drain or fill wetland activity~~ is located, or its delegate. ~~Lacking an indication, the local government unit must be the county, city or its delegate.~~

B. In the seven-county metropolitan area, the local government unit is the city, town, ~~soil and water conservation district~~, or water management organization regulating surface-water-related matters in the area in which the ~~drain or fill wetland activity~~ is located, or its delegate. The watershed management plan adopted under Minnesota Statutes, section [103B.231](#), and related board rules will normally indicate the appropriate local government unit. Lacking an indication, the local government unit must be the city, town, or its delegate.

C. If the ~~activity in a~~ wetland is located in two jurisdictions, the local government unit is the one exercising zoning authority over the project or if both have zoning authority, the one in which most of the wetland ~~loss impacts~~ will occur. If no zoning permits are required, the local government unit is the one in which most of the wetland ~~loss impacts~~ will occur. If an ~~activity project~~ will affect wetlands in more than one local government unit, the board will coordinate the project review to ensure consistency and consensus among the local government units involved.

D. ~~In those cases where an activity will occur~~ ~~For wetlands~~ on state land, the local government unit is the state agency, or the agency's designee, with administrative responsibility for that land.

The board will resolve all questions as to which government entity is the responsible authority, applying the guidelines in items A to D.

Notwithstanding items A to D, the Department of Natural Resources shall be the approving authority for activities associated with projects requiring permits to mine under Minnesota Statutes, section [93.481](#), and for projects affecting calcareous fens.

E. Delegation of WCA administration from one eligible governmental unit to another shall occur by the passage of resolutions by both parties. The delegation becomes effective when resolutions have been passed by both parties, or on the date specified in the resolutions, whichever is later. Both parties shall provide notice to the board, the commissioner, and the SWCD within 15 business days of adoption of the resolution. The notice must include a copy of the resolution and a description of the applicable geographic area.

**The changes above are proposed in order to make the rule language consistent with 2003 statute changes (SF 905) and to achieve a consistent statewide standard for defining LGU. Part of the default LGU language already existed in the 7-county metro area and was merely incorporated into the non-metro section. Clarification was also added on the process for delegating WCA authority from one local government to another.**

Subp. 2. **Local government unit duties.**

A. A local government unit must provide knowledgeable and trained staff to manage the program or secure a qualified delegate. Otherwise, the board may declare a moratorium as prescribed in part [8420.0260](#) or take other appropriate legal action to assure proper implementation and compliance with this chapter. For the purposes of complying with this part, local government staff or qualified delegates must attend annual training provided or approved by the board and, by January 1, 2012, must obtain wetland delineator certification through the Minnesota Wetland Delineator Certification Program. The board may establish additional standards and requirements for training, experience, and certification.

**The above changes are intended to clarify the current rule requirements of providing “knowledgeable and trained staff” and strengthen the technical and administrative capacity of LGU staff. This will reduce areas of dispute, make staffing capabilities more consistent across the state, and improve implementation of WCA.**

B. The local government unit may place the decision authority for exemption, no-loss, wetland boundary ~~and/or~~ type, sequencing, replacement plan, and wetland banking determinations with local government unit staff according to procedures it establishes. For final determinations made by staff, the local government unit must establish a local appeal process that includes a n evidentiary public hearing before appointed or elected officials. The final determination of staff becomes final if not appealed to the local government unit within 30 days after the date on which the decision is mailed to those required to receive notice of the decision. Notwithstanding the timeframes of Minnesota statutes 15.99, or any other law to the contrary, the local government unit must make a ruling within 30 days from the date of the filing of the appeal, unless the appellant and local government unit mutually agree, in writing, to an extension of time beyond the 30 days.

Appeal of a final determination made by staff may be made by the landowner, by any of those required to receive notice of the decision, or by 100 residents of the county in which a majority of the wetland is located. Appeal is effective upon mailing of the petition and payment of any applicable fees to the local government unit. A filing fee is not required for appeals petitioned by state agencies or members of the

technical evaluation panel. A filing fee is not required for appeals made under part 8420.0250 that have been remanded by the board.

C. An application for an exemption, no-loss, boundary or type, sequencing, replacement plan, or banking plan must not be approved unless entitlement thereto is established by a fair preponderance of the evidence. For each finding of fact and recommendation included in a written technical evaluation panel report that is not adopted by the local government unit, the local government unit must provide detailed reasons for rejecting the finding of fact or recommendation in its record of decision, otherwise the local government unit has not sufficiently considered the technical evaluation panel report.

GD. The notice of decision mailed by the local government unit must include information on the process and time period ~~timeframes~~ to appeal the decision of the local government unit.

E. The local government unit must retain a record of all decisions for a minimum of 10 years after all applicable conditions and requirements pertaining to the project approval are fulfilled.

**These changes are proposed to clarify the local appeal process procedures and the LGU document retention requirements.**

DE. The local government unit and soil and water conservation district may charge processing fees in amounts not greater than are necessary to cover the reasonable costs of implementing this chapter and for technical and administrative assistance to landowners in processing other applications for projects affecting wetlands.

G. The local government unit must annually report information to the board regarding implementation of the act in the format and time period provided by the board. Failure to comply with the board's reporting requirements may subject the local government to penalty under part 8420.0260.

**This change makes annual reporting mandatory by all LGUs and will result in improved data, transparency, and program accountability.**

STAT AUTH: MS s [14.06](#); [103B.101](#); [103B.3355](#); [103G.2242](#)  
HIST: 18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135

#### **8420.0260 PENALTY FOR LOCAL GOVERNMENT UNIT FAILURE TO APPLY LAW.**

A. Each local government unit of the state, except tribal lands, shall acknowledge, in writing, to the board that it is assuming its responsibilities under this chapter and the act. Local government units from which an affirmative response is not received shall be given written notice by the board that there is a 60-day moratorium in the local government unit's jurisdiction on exemption, wetland boundary, wetland type, no-loss, replacement plan, and banking determinations. The board shall end the moratorium within the 60 days upon written agreement by the local government unit that it will assume its duties under this chapter and the act. If at the end of the initial 60-day moratorium a written agreement has not been made for the local government unit to apply the law, the board can extend the moratorium until the local government unit agrees to apply the law.

B. If the board has information that a local government unit is not following this chapter or the act in making exemption, no-loss, replacement plan, public road project notice reviews, ~~wetland~~ boundary, ~~wetland~~ type, or banking determinations; ~~or~~ if the local government unit does not have knowledgeable and trained staff with experience in wetland management; or if the local government unit fails to comply with the board's reporting requirements, the board shall notify the local government unit in writing of its concerns. The local government unit shall respond in writing within 60 days of being notified by the

board. If not satisfied with the local government unit's written response, or none is received, the board shall ask the local government unit to appear at a hearing before the board to discuss the matter. The board may invite comments from other local governments or state and federal agencies. If the board determines at the hearing, that corrective action is necessary, the board shall write the local government unit directing specific corrective action to occur within 60 days of receiving the board's decision. The notice shall explain the reason for the action.

C. If, after the 60-day period described in this part the local government unit has not corrected the problem to the satisfaction of the board, the board shall declare a moratorium as prescribed in item A or take other appropriate legal action to ensure compliance.

STAT AUTH: MS s [14.06](#); [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135

#### **8420.0268 COMPENSATION CLAIMS AGAINST LOCAL GOVERNMENT UNITS.**

Subpart 1. **Intervention.** At the request of a local government unit against which a compensation action is brought based at least in part on the local government unit's application of Minnesota Statutes, section [103G.222](#), [103G.2241](#), [103G.2242](#), [103G.237](#), or [103G.2372](#), or rules adopted by the board to implement these sections, the state, through the attorney general, shall intervene in the action on behalf of the local government unit and shall thereafter be considered a defendant in the action. A local government unit making a request under this subpart shall provide the attorney general with a copy of the complaint as soon as possible after being served. If requested by the attorney general, the court shall grant additional time to file an answer equal to the time between service of the complaint on the local government unit and receipt of the complaint by the attorney general.

Subp. 2. **Liability of state for certain costs.** The state is liable for costs, damages, fees, and compensation awarded in the action based on the local government unit's adoption or implementation of standards that are required by state law, as determined by the court. The local government unit is liable for costs, damages, fees, and compensation awarded in the action based on local standards that are more restrictive than state law and rules.

Subp. 3. **Definition.** For purposes of this part, "compensation action" means an action in which the plaintiff seeks compensation for taking private property under the state or federal constitution.

STAT AUTH: MS s [103B.101](#); [103B.3355](#); [103G.2242](#)

HIST: 22 SR 1877

*Current as of 06/15/06*

#### **8420.0270 COMPENSATION.**

Replacement plan applicants who have completed the local government unit process and the board appeal process, and the plan has not been approved as submitted, may apply to the board for compensation under Minnesota Statutes, section [103G.237](#).

The application must identify the applicant, locate the wetland, and refer the board to its appeal file in the matter.

The application must include an agreement that in exchange for compensation the applicant will convey to the state a perpetual conservation easement in the form required by Minnesota Statutes, section [103F.516](#). The applicant must provide an abstract of title demonstrating the ability to convey the easement free of any prior title, lien, or encumbrance. Failure to provide marketable title negates the state's obligation to compensate.

The applicant must submit official documentation from the United States Army Corps of Engineers, the Minnesota Pollution Control Agency, the watershed district or water management organization if any, the county, and the town or city, as applicable, that the proposed ~~drain or fill wetland impact~~ activity and the proposed subsequent use of the wetland are lawful under their respective legal requirements.

The landowner must demonstrate that the proposed ~~drain or fill wetland impact~~ is a feasible and prudent project and that the replacement plan as proposed is a reasonable good faith effort to fulfill the replacement requirements of parts [8420.0500](#) to [8420.0630](#) and the act.

If the plan was approved, but with conditions or modifications, the applicant must show that the conditions or modifications make the replacement unworkable or not feasible. A plan is unworkable or not feasible if the replacement must be on land that the applicant does not own, the applicant has made good faith efforts to acquire a replacement site and not succeeded, and there is not a qualifying replacement available in a wetland bank. A plan is also unworkable or not feasible if it is not possible to carry out for engineering reasons. The applicant must show that not going ahead with the proposed project will cause the applicant damages and that disallowing the proposed use will enhance the public values of the wetland.

The applicant must submit the requirements in this part in writing, by certified mail, to the board. If the applicant wants to make oral argument to the board, it must be indicated as part of the application. The board may require that the applicant appear before the board.

If the board finds that the applicant has submitted a complete application and proved the requirements in this part, the board shall compensate the applicant as required by law within 90 days after the board received a completed application, provided that within the same time period the applicant must convey to the board a conservation easement in the form required by Minnesota Statutes, section [103F.516](#). If the board does not provide the required compensation in exchange for the conservation easement, the applicant may ~~drain or fill impact~~ the wetland in the manner proposed, without replacement.

STAT AUTH: MS s [14.06](#); [103B.101](#); [103B.3355](#)

HIST: 18 SR 274